Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 933

EL-GE POTATO CHIP COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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November, 1970.

The Daily Record Co., Baltimore, Md. 21203

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EL-GE POTATO CHIP COMPANY, INC.,
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v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

El-Ge Potato Chip Company, Inc.,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on August 7, 1970.

OPINIONS BELOW

The opinion of the court of appeals (App. 2a)[2] is reported at 427 F. 2d 963. The decision and order of the National Labor Relations Board is reported at 173 NLRB No. 19 (App. 7a).

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[1] Hereinafter referred to as the "Company."

[2] "App." refers to the Appendix to the petition, which appears at pp. 1a-31a. "J.A." refers to the portions of the record printed as a Joint Appendix in the court below.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1970 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board improperly refused to conduct a post-election hearing on the Company's objections to the election?

REGULATIONS INVOLVED

The relevant portions of the Board's Rules and Regulations appear at 29 C.F.R. § 102.69.

> If objections are filed to the conduct of the election or conduct affecting the results of the election . . . the regional director shall investigate such objections. . . . If a consent election has been held pursuant to Section 102.62 (b), the regional director shall prepare and cause to be served on the parties a report on challenged ballots or objections, or both, including his recommendations. . . . In either instance, such action by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, he shall issue and cause to be served on the parties a notice of hearings on said issues before a hearing officer.
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> • • • • • •
>
> In a case involving a consent election held pursuant to Section 102.62 (b), if exceptions are filed, either to the report on challenged ballots or objections, or both if it be a consolidated report, and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other

disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer.

STATEMENT

On November 17, 1967, pursuant to a Stipulation for Certification Upon Consent Election, the Board's Regional Director for the Fourth Region conducted an election among a unit of 23 employees of El-Ge Potato Chip Company, Inc. There were 12 ballots cast for the Union,[3] 11 against it and one challenged ballot (J.A. 84).

The challenged ballot was cast by a former employee, Daniel Sharp (J.A. 55). Sharp had been discharged by the Company on October 26, 1967, over three weeks before the election (J.A. 73). No charge was ever filed with the Board alleging an unlawful discharge in Sharp's case either before the election or thereafter (J.A. 6-7). Sharp was thus clearly an ineligible voter as the Regional Director concluded after the election (J.A. 7). Sharp's discharge had been brought about by a willful act of destruction of the Company's property. Two other employees were involved in the same incident, but they only received warnings because it was their first offense, while Sharp had two previous offenses (J.A. 73).

Sharp's discharge was a major issue in the pre-election campaign waged by the Union (J.A. 74). So strong was the feeling concerning Sharp that one employee informed a Company official that he would vote against the Union if Sharp was rehired (J.A. 74). Another employee stated,

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[3] Local 430, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

after the election, that Sharp's presence during the voting "influenced many of the truck loaders to vote for the Union" (J.A. 74-75).

The confusion concerning Sharp's being allowed to cast even a challenged ballot was caused, in part, by difficulties in the timing of the pre-election procedures. Although the election was scheduled for 3:15 p.m. with a pre-election conference to precede it[4] the Board agent, who conducted the election, did not arrive at the plant until approximately 3:20 p.m. due to inclement weather (J.A. 74). There was thus no time to discuss the matter of Sharp's voting, if he appeared, or to give the Board agent the details of the situation since the election was already late in starting (J.A. 74).

All of the facts set forth above were presented to the Regional Director, in the form of statements, during the post-election Objections investigation conducted by the Regional Director (J.A. 73-76). The statements provided by the Company also show that prior to the election the atmosphere at the Company made a free election impossible. There was a great deal of discussion among the the Company's drivers and others concerning the refusal of employees at Gourmet Snacks, Inc., a customer of the Company's to unload El-Ge products from trucks driven by non-union drivers (J.A. 8-11).

Subsequent to the election, which the Union won by one vote, the Company, pursuant to Section 102.69 (a) of the Board's Rules and Regulations, filed its Objections to Conduct Affecting the Results of the Election, based on the incidents set forth above and other conduct (J.A. 3-4).

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[4] Pre-election conferences are normally held thirty to sixty minutes before the election. The conference in the instant case was scheduled for 2:45 p.m. (J.A. 74).

The Regional Director conducted an investigation of these Objections and dismissed them without a hearing (App. 22a). The Company filed Exceptions to the Regional Director's Report urging the Board to set aside the election or, in the alternative, to order a hearing (J.A. 15-23).

On March 7, 1968, the Board perfunctorily adopted the Regional Director's Report, again without a hearing and certified the Union (App. 20a). The Company then refused to bargain with the Union, so as to gain review before this Court of the Regional Director's Report on its Objections, as affirmed by the Board. The Board accordingly found a violation of Section 8(a)(5) of the Act (App. 7a). At no time during the entire proceeding was the Company afforded an evidentiary hearing.

REASONS FOR GRANTING THE WRIT

Review by this Court is necessary to decide a question of importance in the administration of the federal labor laws, which has not been settled by this Court. Furthermore, the decision by the court of appeals is in conflict with the decisions of the other circuits on this question.

1. The Board, in concluding, without a hearing, that Sharp's presence at the election and his casting of a ballot had no effect on the election, ignored the realities of what takes place at an N.L.R.B. election and the evidence presented by the Company.

Prior to the election at least one employee stated that his vote would be affected by the disposition of Sharp's case (J.A. 74). After the election another employee said that Sharp's presence during the election "influenced many of the truck loaders to vote for the Union" (J.A. 75). The two other employees involved in the incident which triggered Sharp's discharge would also be vitally interested in

the outcome of his discharge case. Against this background of Sharp's discharge being a major concern of the employees and thus an important campaign issue, and the Company's determined refusal to reinstate him, no imagination is required to realize the impact Sharp's sudden appearance and casting of a ballot would have on his supporters. Anyone who has participated in a Board election realizes that employees do not understand the meaning and mechanics of the challenged ballot. To the employee's eyes Sharp was being allowed to vote and the reasonable conclusion to reach was that Sharp had been reinstated by the Union.[5]

2. The cases in other circuits are clear that an objecting party is entitled to a hearing on its objections to an election if such objections are supported "with specific evidence which *prima facie* would warrant setting aside the election." *N.L.R.B. v. O. K. Van Storage, Inc.*, 297 F. 2d 74, 75 (C.A. 5, 1961); *Home Town Foods, Inc. v. N.L.R.B.*, 379 F. 2d 241 (C.A. 5, 1967). The statements supplied by the Company to the Board in this case, we submit, clearly establish such a *prima facie* case.

The Company has shown that the issuance of a ballot to Sharp did affect the results of the election. The fact that the Regional Director's Report based, in part, on affidavits procured by Board agents during the Board's *ex parte* investigation "made short shrift of the *prima facie* case" does not defeat Petitioner's right to a hearing. *N.L.R.B. v. Lamar Electric Membership Corp.*, 362 F. 2d 505, 508 (C.A. 5, 1966). In *Sonoco Products Co. v. N.L.R.B.*, 399 F. 2d 835 (C.A. 9, 1968) the court agreed:

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[5] In *Cooper Supply Company*, 120 NLRB 1023, 1024 (1958), the Board agent refused to issue ballots to obviously ineligible voters and explained why to the assembled workmen before the election. If that procedure had been followed here, much confusion would have been avoided.

> The Regional Director cannot cause [the employer's] statement to vanish by conducting his own examination; although the Board's agents may discover evidence suggesting one result, that does not mean, where an employer or the union has presented evidence to the contrary that there is no substantial and material factual issue.

The refusal of the Regional Director and the Board to grant the Company's requests for a hearing was an abuse of Board's discretion and a deprivation to the Company of its right to due process of law.

Several of the circuit courts of appeal have refused to enforce an order to bargain because the Board refused to hold an open hearing of disputed evidence related to objections to conduct affecting the results of an election or to challenged ballots involved in the election. *N.L.R.B. v. Joclin Manufacturing Co.*, 314 F. 2d 627 (C.A. 2, 1963); *N.L.R.B. v. Lord Baltimore Press, Inc.*, 300 F. 2d 671 (C.A. 4, 1962); *N.L.R.B. v. Dallas City Packing Co.*, 230 F. 2d 708 (C.A. 5, 1956); *N.L.R.B. v. Poinsett Lumber & Manufacturing Co.*, 221 F. 2d 121 (C.A. 4, 1955); *N.L.R.B. v. Trancoa Chemical Corp.*, 303 F. 2d 456 (C.A. 1, 1962); *N.L.R.B. v. West Texas Utilities Co.*, 214 F. 2d 732 (C.A. 5, 1954); *N.L.R.B. v. Monroe Auto Equipment Co.*, 406 F. 2d 177 (C.A. 5, 1969); *N.L.R.B. v. Genesco, Inc.*, 406 F. 2d 393 (C.A. 5, 1969).

The Company in the instant case has supplied the Board with statements which present a *prima facie* case in support of its objections. The Regional Director and the Board have chosen to disregard these statements and decide the case on different bases.

As Judge McLaughlin stated in his dissent (App. 6a):

> The categorical offer of employees' statements that Sharp did grossly interfere with a fair election was

ignored by the Board. Respondent is here simply seeking a hearing as to the integrity of the election. It has never had that. It has been deprived of due process.

A ruling to decide this question is important not only to resolve the conflict in the circuits but because of the great number of cases involving objections to elections which the Board processes each year.[6]

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

EARLE K. SHAWE,

ROBERT S. HILLMAN,

SHAWE & ROSENTHAL,

Attorneys for Petitioner.

November, 1970.

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[6] In fiscal year 1968 alone the Board disposed of 1,313 objections cases, *Thirty-Third Annual Report of the National Labor Relations Board* (1968).

APPENDIX A

United States Court of Appeals
For The Third Circuit

No. 19010

National Labor Relations Board,
Petitioner,

v.

El-Ge Potato Chip Company, Inc.,
Respondent.

JUDGMENT

Present: McLAUGHLIN, FREEDMAN, and GIBBONS, *Circuit Judges.*

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board of the enforcement of a certain order issued by it against Respondent, El-Ge Potato Chip Company, Inc., its officers, agents, successors, and assigns on October 7, 1968. The Court heard argument of respective counsel on March 20, 1970, and has considered the briefs and transcript of the record filed in this cause. On June 29, 1970, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Respondent, El-Ge Potato Chip Company, Inc., its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against Respondent.

BY THE COURT

ABRAHAM L. FREEDMAN,

Dated: August 7, 1970. Circuit Judge.

APPENDIX B

OPINION OF THE COURT

(Filed June 29, 1970)

FREEDMAN, *Circuit Judge.*

The National Labor Relations Board seeks enforcement under § 10(e) of the National Labor Relations Act[1] of its order finding respondent, El-Ge Potato Chip Company, Inc., in violation of § 8(a)(1) and (5) of the Act[2] and directing it to bargain with Local 480, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

The Board, following a representation election had certified the union as the collective bargaining representative of a unit[3] of the company's employees. The company seeks to justify its refusal to bargain because the representation election was invalid and it was never afforded a hearing before the Board on its objection to the election. Such attacks on the merits of the certification are properly before us in this proceeding.[4]

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[1] 29 U.S.C. § 160(e).

[2] 29 U.S.C. § 158(a)(1) and (5).

[3] As stipulated, the unit includes "all truck drivers, warehousemen, and mechanics, including the warehouse clerk, leader, receiving clerk and extra drivers, but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act."

[4] See, e.g., N.L.R.B. v. Metropolitan Life Insurance Co., 380 U.S. 438, 439 (1965); Pittsburgh Glass Co. v. N.L.R.B., 313 U.S. 146, 154 (1941); American Federation of Labor v. N.L.R.B., 308 U.S. 401, 408-11 (1940); N.L.R.B. v. Sun Drug Co., 359 F. 2d 408, 410 (3 Cir. 1966).

On November 17, 1967, pursuant to a Stipulation for Certification upon Consent Election, the Board's regional director conducted the election among the unit employees. Twelve ballots were cast for the union and 11 against it. In addition, over the company's objection a challenged ballot was cast by Daniel Sharp, who had been on the company's payroll as of the eligibility date for voting but had been discharged thereafter but prior to the election.

On November 24, 1967, the company filed timely objections to the election, contending that the Board's agent had prejudiced the election when he permitted Sharp to enter on the company premises and cast the challenged ballot. The company claimed that Sharp's discharge had been a "paramount" issue in the campaign and his appearance created the impression that the union had secured his reinstatement by authority of the Board after an unlawful discharge by the company. The company also claimed that the union had threatened employees that if they did not vote for the union the company would lose the business of one of its largest distributors, and if they voted for the union it would secure for them extra jobs on their days off from other employers with whom it had contracts. The company additionally claimed that union adherents had told an employee that he would be one of the first to be discharged if the union lost the election.

The regional director investigated both the challenge and the objection, and afforded the parties the opportunity to submit evidence. His report invalidated Sharp's ballot, which did not alter the result, but rejected the objections to the election. He observed that there was no evidence that Sharp engaged in any electioneering appeals while on the company's premises, and he concluded that the election conditions were not such that Sharp's presence as a voter at the election impaired the free choice of the employees. The regional director also found that there was no evidence of threats of reprisal against eligible voters or of a general atmosphere of fear. He found that while for several years the company's drivers had discussed with employees of one of its distributors the possibility that

the distributor's employees might choose not to unload non-union goods arriving from the company, the union had taken no part in these conversations, many of which occurred before the election petition was filed and therefore could not, under settled Board practice, serve as a basis for overturning the election. He also found that the union was not responsible for the alleged threats of discharge of the individual employee and that in any case the threats were made prior to the filing of the election petition. As for the alleged promise of extra jobs, the regional director found that they could not be attributed to the union or its agents and were in the nature of legitimate discussion by employees of the possible advantages of unionization. Finally, the regional director rejected the company's contention that the cumulative effect of all these events was to deprive the employees of their freedom of choice in the election. He accordingly recommended that the union be certified as the collective bargaining agent of the unit.

The company filed timely exceptions to the report, requesting that the election be set aside or, in the alternative, that a hearing be held to resolve the factual issues it claimed had been raised by the objections. The Board, however, found that the company's exceptions raised "no material or substantial issue of fact or law" warranting either a reversal of the regional director's findings or a hearing. The Board therefore certified the union.

It was long ago settled that the Board is entrusted with a "wide degree of discretion" in establishing and enforcing the procedure and safeguards necessary to insure the fair and free choice by employees of their bargaining representatives.[5] "Considerable weight . . . must therefore be accorded the Board's findings, with judicial review narrowly limited to ascertaining only their reasonableness."[6] Whether this court would reach the same con-

[5] N.L.R.B. v. Tower Co., 329 U.S. 324, 330 (1946); Southern S.S. Co. v. N.L.R.B., 316 U.S. 31, 37 (1942).

[6] N.L.R.B. v. Golden Age Beverage Company, 415 F. 2d 26, 29 (5 Cir. 1969).

clusion from the evidence as did the Board is immaterial,[7] as long as the Board's finding that the election was fairly conducted is supported by substantial evidence in the record considered as a whole.[8]

After reviewing the entire record, we cannot say that the Board acted unreasonably in concluding that the election was fair and proper.

The company further contends that at the very least it was entitled to an evidentiary hearing before the Board pursuant to § 102.69(c) of the Board's Rules and Regulations.[9] In N.L.R.B. v. Sun Drug Co., 350 F. 2d 408, 414 (3 Cir. 1966), we said:

> "Judicial decisions have clearly established that the courts will review Board orders based on the disposition of challenges to crucial ballots without an evidentiary hearing to ensure that they are considered with these rules. The parties are entitled to such a hearing if substantial and material factual issues are raised, and if the Board has clearly erred in denying a hearing its order will not be enforced. It is equally clear, however, that such a hearing will not be required if no such issues existed, either because the regional director and the Board have assumed the truth of the factual offer of the objecting party, or because they have reasonably concluded that the facts alleged would not constitute legal justification for setting the election aside."[10]

The present case is unlike N.L.R.B. v. Capitol Bakers, Inc., 351 F. 2d 45 (3 Cir. 1965), where the challenged ballot could have changed the outcome of the election and therefore was of critical significance in the election itself. We held that the employer should have been afforded a hearing

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[7] N.L.R.B. v. Waterman S.S. Co., 309 U.S. 206, 226 (1940).

[8] Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 477 (1951).

[9] 29 C.F.R. § 102.69(c).

[10] Accord, e.g., N.L.R.B. v. Singleton Packing Corp., 418 F. 2d 275, 280 (5 Cir. 1969); N.L.R.B. v. Joclin Mfg. Co., 314 F. 2d 627, 631-32 (2 Cir. 1963).

on the challenged ballot before the Board, especially in the light of the unusual circumstances of that case. Here Sharp's ballot itself could not affect the result of the election. The Board in reviewing the regional director's report and the company's exceptions to it concluded that the exceptions raised "no material or substantial issues of fact or law." Our independent review of the record convinces us that no new substantial factual material was presented which required a fresh hearing and that the Board's conclusion on the record before it was fully justified. The company failed to furnish evidence which would indicate misconduct so serious and so related to the election as to render it unfair and invalid.[11] The effect on the voting employees of such matters as Sharp's participation in the election and the discussions by some employees, none of whom were union officials, as to the effect of the election on the company's prospects and policies was highly speculative at best, and the acts complained of did not themselves constitute conduct so wrongful in nature or so prejudicial in effect as to warrant setting aside this hotly-contested but fairly conducted election.

The Board's petition for enforcement will be granted.

McLAUGHLIN, *Circuit Judge*, dissenting.

The National Labor Relations Board did possess "a wide degree of discretion in establishing and enforcing the procedure and safeguards necessary to insure the fair and free choice by employees of their bargaining representatives." Palpably, that discretion was abused in this instance. The election here was decided by one vote. The discharge of employee Sharp was admittedly a major issue in the election. He had been discharged more than three

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[11] See, e.g., N.L.R.B. v. Singleton Packing Corp., 418 F. 2d 275, 281 (5 Cir. 1969); Intertype Company v. N.L.R.B., 401 F. 2d 41, 44 (4 Cir. 1968), cert. denied 393 U.S. 1049 (1969); N.L.R.B. v. Bata Shoe Company, 377 F. 2d 821, 826 (4 Cir. 1967); N.L.R.B. v. Zelrich Company, 344 F. 2d 1011, 1015 (5 Cir. 1965); Rockwell Manufacturing Co. v. N.L.R.B., 330 F. 2d 795, 797 (7 Cir.), cert. denied 379 U.S. 890 (1964).

weeks prior to the election. He was plainly not eligible to vote but vote he did. There was evidence that his presence during the election influenced many of the employees to vote for the union. Even so the union won by only a single vote. The Regional Director himself some time after the election, formally decided that Sharp had no right to vote. Nor did he have the right to throw his weight around at the balloting. The categorical offer of employees' statements that Sharp did grossly interfere with a fair election was ignored by the Board. Respondent is here simply seeking a hearing as to the integrity of the election. It has never had that. It has been deprived of due process.

I would remand the case to the Board for a conscientious, full hearing as to the election before us.

APPENDIX C

Decision and Order

On July 17, 1968, Trial Examiner Charles W. Schneider issued his Decision in the above-entitled proceeding, granting General Counsel's Motion for Summary Judgment, on the ground that there are no unresolved issues requiring an evidential hearing and finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended. The Trial Examiner recommended that the Respondent cease and desist from such unfair labor practices and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case,

and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order, the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, El-Ge Potato Chip Company, Inc., York, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C. October 7, 1968.

JOHN H. FANNING,
Member

HOWARD JENKINS, JR.,
Member

SAM ZAGORIA,
Member

(Seal)

National Labor Relations Board.

APPENDIX D

TRIAL EXAMINER'S DECISION

Statement of the Case

The Representation Proceeding[1]

CHARLES W. SCHNEIDER, Trial Examiner: Upon petition for certification as collective-bargaining representative filed

[1] Administrative or official notice is taken of the record in the representation proceeding, Case No. 4-RC-7499, as the term "record" is defined in Sections 102.68 and 102.69(f) of the Board's Rules

on September 28, 1967 by Teamsters Local Union No. 430, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, the Regional Director for Region 4 of the Board on October 25, 1967, approved a Stipulation for Certification Upon Consent Election executed by El-Ge Potato Chip Company, York, Pennsylvania, herein called the Respondent, and by the Union. The appropriate bargaining unit was stipulated to be the unit found appropriate hereinafter.

Pursuant to the stipulation, an election by secret ballot was conducted on November 17, 1967, under the supervision and direction of said Regional Director. Immediately following the election, the parties were served with copies of the tally of ballots which showed that of approximately 24 eligible voters, 24 cast ballots, of which 12 were for, and 11 were against the Union. There was 1 challenged ballot, sufficient to affect the results of the election. On November 24, 1967, the Respondent filed timely objections to conduct affecting the results of the election alleging: (1) that the Respondent's employees were coerced and restrained in the exercise of their rights guaranteed under the Act, and were denied the opportunity to make a free, fair and reasoned choice in the election, and (2) that the Union had interfered with the election by certain described conduct.

The Regional Director for Region 4 conducted an investigation of the challenge and objections. On January 18, 1968, the Regional Director issued a Report and Recommendation on Objections and Challenge in which he found and recommended that the challenge to the ballot of Daniel Sharp be sustained and his ballot not be counted. The Director further found that the Respondent's objec-

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(Rules and Regulations and Statements of Procedure, National Labor Relations Board, Series 8 as revised January 1, 1965). See *LTV Electrosystems, Inc.*, 166 NLRB No. 81 enf'd 399 F. 2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB No. 24; *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C. Va. 1967); *Follett Corp; et al.*, 164 NLRB No. 47, enf'd F. 2d (C.A. 7, 1968), 68 LRRM 2474; Section 9(d) of the NLRA.

tions raised no substantial or material issues with respect to the election, and recommended to the Board that the objections be dismissed. Thereafter on February 2, 1968, Respondent filed timely exceptions and a supporting brief with the Board relating to the Regional Director's ruling on the Objections to Conduct Affecting the Results of the Election. No exception was filed to the Regional Director's recommendation concerning the challenged ballot.

On March 7, 1968, the Board issued its Decision and Certification of Representative in which it found that Respondent's exceptions raised no material or substantial issues of fact or law warranting reversal of the Regional Director's findings and recommendations. Accordingly, the Board adopted the Regional Director's findings, conclusions, and recommendations and certified the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit.

The Complaint Case

On April 22, 1968, the Union filed the unfair labor practice charge involved in the instant case, in which it alleged that since on or about March 26, 1968, and continuously thereafter, the Respondent has refused and is refusing to bargain with the Union.

On April 30, 1968, the General Counsel, by the Regional Director of Region 4, issued a complaint and notice of hearing alleging that the Respondent had committed unfair labor practices in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act by refusing to bargain with the Union upon request. In due course the Respondent filed its answer to the complaint in which certain allegations of the complaint were admitted and others denied.

In its answer the Respondent admits the following allegations of its complaint: (1) jurisdictional, (2) that the Union is a labor organization within the meaning of Section 2(5) of the Act, and (3) that the unit is appropriate. Respondent denies the allegations contained in paragraphs

5, 6, 7, 8, 9, 10, 11, and 12, of the complaint wherein it is alleged: (1) a majority of the employees designated and selected the Union in the November 17, 1967, election as their bargaining representative, but admits that an election was held in the unit and that the Board issued a certification on March 7, 1968, (2) that the Union has been and is now the exclusive representative for purposes of collective bargaining of a majority of the employees in the unit, (3) that commencing on or about March 26, 1968, and continuing to date, the Union requested, and is continuing to request Respondent to meet and bargain collectively, (4) that commencing on or about April 17, 1968, and continuing to date, Respondent refused and continues to refuse, to bargain collectively with the Union as the collective-bargaining representative of all the employees, notwithstanding that the Union was, and is the duly designated exclusive collective-bargaining representative of the employees, and (5) that by the refusal to bargain, in connection with the other allegations described the Respondent did engage in, and is engaging in unfair labor practices affecting commerce within the meaning of the Act.

Under date of May 17, 1968, received May 20, Counsel for the General Counsel filed a Motion for Summary Judgment on the Pleadings and for Issuance of Trial Examiner's Decision and Recommended Order and a memorandum in support of said motion, in which he contends that the pleadings considered together with the official Board record in the underlying representation proceeding, Case No. 4-RC-7499, raise no issues requiring a hearing; that Respondent's defense set forth in its answer raises no litigable question of fact, and, as a matter of law, Respondent has no valid defense to the complaint.

On May 20, 1968, I issued an Order directing the parties to show cause as to whether or not General Counsel's Motion should be granted. On June 4, 1968, Counsel for the Respondent filed a Statement in Opposition to the General Counsel's Motion for Summary Judgment. On June 7, 1968, Counsel for the Charging Party, filed a letter dated June 3, 1968, in which he stated that the Charging Party's position was that the motion should be granted.

It appearing that the Motion papers provided no basis for resolution of an apparent factual issue as to whether the Respondent refused to bargain with the Union as alleged in paragraph 8 of the complaint, I issued an Order on June 17, 1968, denying the Motion for Summary Judgment, without prejudice to the submission of further material bearing on that issue. On June 24, 1968, Counsel for the Respondent filed a Statement in Support of the Trial Examiner's Order. On the same day counsel for the General Counsel submitted an affidavit, dated June 19, 1968, by William A. Widmer, III, attorney for the Union, to establish the refusal to bargain. On June 25, 1968, I issued a further order affording the Respondent until July 2, 1968, to file a response to the affidavit. On June 27, 1968, I received an answer from the Respondent dated June 26, 1968, to the affidavit of Attorney Widmer. No other response has been received. As appears more fully *infra*, I find that the record now establishes that the Respondent refused to meet and bargain with the Union as representative of the employees in the appropriate unit. To the extent that it denied the motion for summary judgment, the order of June 17, 1968 is reconsidered and withdrawn.

Ruling on Motion for Summary Judgment on the Pleadings

Respondent contends that General Counsel's Motion for Summary Judgment on the Pleadings should be denied for the reason that (1) Respondent is entitled by law to a hearing, and (2) there are unresolved issues of fact and credibility raised by Respondent's objections in Case No. 4-RC-7499 which were not resolved in the Regional Director's Report on Objections and which can only be resolved by a hearing.

Respondent contends (citing *N.L.R.B. v. KVP Sutherland Paper Company*, 356 F. 2d 671 (C.A. 6); *N.L.R.B. v. Bata Shoe Co.*, 377 F. 2d 821 (C.A. 4); *N.L.R.B. v. Lamar Electric Membership Corp.*, 362 F. 2d 505 (C.A. 5); *N.L.R.B. v. Lord Baltimore Press, Inc.*, 300 F. 2d 671 (C.A. 4); *N.L.R.B. v. Poinsett Lumber & Manufacturing Co.*, 221 F.

2d 121 (C.A. 4); and the Board's brief to the Supreme Court (p. 12) in the case of *American Federation of Labor v. N.L.R.B.*, 308 U.S. 401) that Section 10(b) of the Labor Management Relations Act, as amended, Section 5 of the Administrative Procedure Act, and Section 101.10 of the Board's Statements of Procedure, entitle Respondent to a hearing as a matter of right. The Respondent further contends such right may not be abrogated by the Board by a summary judgment procedure for which there is no provision in the Board's Rules and Regulations, and which would in any event not be in compliance with the notice and hearing requirements of Section 4 of the Administrative Procedure Act. I do not find these propositions supported.

The Respondent asserts that the election and the request for bargaining by the Union were invalid and that it is therefore under no legal obligation to meet with and to bargain with the Union. The questions as to the validity of the election, and the merit of the Respondent's objections to conduct affecting the results of the election, were raised by the Respondent and were decided by the Regional Director and the Board in the representation proceeding. Those issues have thus been adjudicated. It is established Board policy, in the absence of newly discovered or previously unavailable evidence or special circumstances, not to permit litigation before a trial examiner in an unfair labor practice case of issues which were or could have been litigated in a prior related representation proceeding.[2]

This policy is applicable even though no formal hearing on objections has been provided by the Board. Such a hearing is not a matter of right unless substantial and ma-

[2] *Howard Johnson Company*, 164 NLRB No. 121; *Metropolitan Life Insurance Company*, 163 NLRB No. 71; see *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S 146, 162 (1941); Rules and Regulations and Statements of Procedure, National Labor Relations Board, Series 8 as revised January 1, 1965, Sections 102.67 (f), and 102.69 (c).

terial issues are raised by the objections.[3] The cases cited by the Respondent do not negate this proposition; they merely hold that where there *are* substantial and material issues a hearing is required.

The excerpt cited by the Respondent from the Board's brief in the case of *American Federation of Labor v. N.L.R.B.*, 308 U.S. 401, does not state the contrary. That passage is to be interpreted as asserting that an evidential hearing is required by Section 10(b) of the Act where there are material unresolved factual issues. Here the Board has determined that there are none. The Board's findings are not res judicata in the sense that they cannot be reconsidered by the Board upon application, or reviewed by the courts. They are, however binding on the trial examiner at this stage of the proceeding, in the absence of newly discovered or previously unavailable evidence or special circumstances, none of which are asserted to be present here. There being a refusal to bargain, as is hereinafter found, there is no issue litigable before a trial examiner, and therefore no matter requiring hearing. In such circumstances the Board and the Trial Examiner have authority to enter summary judgment. In the case of *Harry T. Campbell Sons' Corporation*, 164 NLRB No. 36, footnote 9, the Board said:

> The Respondent's contention that Section 5 of the Administrative Procedure Act, Section 10(b) of the Labor Management Relations Act, as amended, and the Board's own Rules and Regulations, all guarantee an absolute right to hearing is without merit. In circumstances such as these, where no litigable issues have been raised the Board may entertain and rule upon Motions for Summary Judgment or Judgment on the Pleadings. Moreover, The Board has exercised these powers in numerous cases. See *Collins & Aik-*

[3] *O.K. Van and Storage, Inc.*, 127 NLRB 1537, enf'd 297 F. 2d 74 (C.A. 5, 1961). And see *Air Control Window Products, Inc.*, 335 F. 2d 245, 249 (C.A. 5, 1964); "If there is nothing to hear, then a hearing is a senseless and useless formality." See also *N.L.R.B. v. Bata Shoe Co.*, 377 F. 2d 821, 826 (C.A. 4, 1967).

man Corp., 160 NLRB 1750; *Brush Moore Newspapers, Inc.*, 161 NLRB 1620; *E-Z Davies Chevrolet*, 161 NLRB 1380; *Herbert Harvey, Inc.*, 162 NLRB No. 83; *Carl Simpson Buick, Inc.*, 161 NLRB 1389; *The Puritan Sportswear Corp.*, 162 NLRB No. 4; and *Frito-Lay, Inc.*, 161 NLRB 950.[4]

The use of summary judgment procedure in such circumstances has been enforced by a number of courts. See *Baumritter Corp.*, 386 F. 2d 117 (C.A. 1, 1967); *Puritan Sportswear Corp.*, 385 F. 2d 142 (C.A. 3, 1967); *LTV Electrosystems, Inc.*, 388 F. 2d 683 (C.A. 4, 1968); *Aerovox Corp.*, 390 F. 2d 653 (C.A. 4, 1968); *Neuhoff Bros. Packers, Inc.*, 362 F. 2d 611 (C.A. 5, 1966); *Tennessee Packers, Inc.*, 379 F. 2d 172 (C.A. 6, 1967); *Follett Corp.*, F. 2d (C.A. 7, 1968), LRRM 2474; *Krieger-Ragsdale & Company, Inc.*, 379 F. 2d 517 (C.A. 7, 1967); *E-Z Davies Chevrolet*, F. 2d (C.A. 9, 1968), 68 LRRM 2228.

There being no unresolved issues requiring an evidential hearing the motion of the General Counsel for summary judgment on the pleadings is granted, and I hereby make the following further:

Findings and Conclusions

I. The Business of the Respondent

El-Ge Potato Chip Company, Inc., the Respondent, is, and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of Pennsylvania. It maintains its principal office and place of business at York, Pennsylvania where it is engaged in the manufacture, sale, and distribution of potato chips and allied food products.

In the course and conduct of its business operations, Respondent during the past year, manufactured and sold

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[4] See also *Union Bros., Inc.*, 162 NLRB No. 140 and cases there cited; *Metropolitan Life Insurance Co.*, 163 NLRB No. 71; *Red-More Corporation d/b/a Disco Fair*, 164 NLRB No. 93; *Ore-Ida Foods, Inc.*, 164 NLRB No. 64; *Continental Nut Co.*, 164 NLRB No. 72; *LTV Electrosystems, Inc.*, 166 NLRB No. 81 (TXD pp. 3-4).

products valued in excess of $50,000 of which products valued in excess of $50,000 were shipped directly to States of the United States other than the Commonwealth of Pennsylvania.

Respondent is, and has been, at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All truck drivers, warehousemen, and mechanics, including the warehouse clerk, leader, receiving clerk and extra drivers, but excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

On November 17, 1967, a majority of Respondent's employees in the said unit designated and selected the Union as their collective-bargaining representative a secret-ballot election conducted under the supervision of the Regional Director of Region 4 of the National Labor Relations Board.

On March 7, 1968, the National Labor Relations Board, after consideration of Respondent's objections to conduct affecting the results in the above-described election, certified the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit.

At all times since March 7, 1968, and continuously to the present, the Union has been the representative for the purpose of collective bargaining of the employees in the said unit, and by virtue of Section 9(a) of the Act has

been, and is now, the exclusive representative of all the employees in said unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

The undisputed facts establish that following the certification the Union requested the Respondent to meet with it for the purposes of collective bargaining and that the Respondent failed and refused to do so. Thus, paragraph 7 of the complaint alleges that on March 26, 1968, the Union requested the Respondent to bargain in the appropriate unit. The answer in this connection denies only that a "valid request" was made, for the reason that no valid election was conducted. Attached to the motion for judgment as Exhibit 6 is a copy of a letter dated March 26, 1968, from Union Attorney Widmer to the Respondent requesting that the Respondent meet and confer with the Union respecting the conditions of employment in the appropriate unit, and suggesting a specific time and place for such meeting. The affidavit of Attorney Widmer, referred to *supra*, establishes that this letter was sent to the Respondent. Respondent does not deny receipt, and makes no assertion that it replied. Attorney Widmer's uncontested affidavit further establishes that, on April 17, 1968, having received no reply to the March 26, letter or to a subsequent letter as to the Respondent's intentions (a copy of which is attached to the affidavit), he telephoned Attorney Wescott, then associated with the law firm representing the Respondent who informed Widmer that the Respondent was going to refuse to bargain with the Union in order to test the Union's certification. On these facts it is found, in accordance with the allegations of the complaint, that commencing on April 17, 1968, the Respondent has refused and continues to refuse to bargain collectively with the Union as the representative of the employees in the appropriate unit.

By thus refusing to bargain collectively the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) of the Act and has interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act.

The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings and conclusions and the entire record in the case, I recommend that the Board issue the following:

ORDER

A. For the purpose of determining the duration of the certification the initial year of certification shall be deemed to begin on the date the Respondent commences to bargain in good faith with the Union as the recognized exclusive bargaining representative in the appropriate unit.[5]

B. El-Ge Potato Chip Company, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from;

(a) Refusing to bargain collectively with Local 430, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit:

> All truck drivers, warehousemen, and mechanics, including the warehouse clerk, leader, receiving clerk and extra drivers, but excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

(b) Interfering with the efforts of said Union to negotiate for or represent employees as an exclusive collective-bargaining representative, or in any like or related manner interfering with employee efforts at self-organization.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

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[5] The purpose of this provision is to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law. See *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785; *Commerce Co. d/b/a Lamar Hotel*, 140 NLRB 226, 229, 328 F. 2d 600 (C.A. 5), cert. den. 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421, 350 F. 2d 57 (C.A. 10, 1965).

(a) Upon request bargain collectively with Local 430, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at its office and place of business in York, Pennsylvania, copies of the notice attached hereto marked "Appendix."[6] Copies of said notice, on forms to be furnished by the Regional Director for Region 4, shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 4, in writing, within 20 days from receipt of this recommended Order what steps the Respondent has taken to comply herewith.[7]

Dated at Washington, D. C. July 17, 1968.

Original signed by:

CHARLES W. SCHNEIDER,

Trial Examiner.

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[6] In the event that this recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[7] In the event these recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 4, in writing, within 10 days from receipt of this Order what steps the Respondent has taken to comply herewith."

APPENDIX E

Decision and Certification of Representative

Pursuant to a Stipulation for Certification upon Consent Election, an election by secret ballot was conducted on November 17, 1967, under the direction and supervision of the Regional Director for Region 4, among the employees in the unit described below. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 24 eligible voters, 24 cast ballots, of which 12 were for, and 11 against, the Petitioner, with 1 challenged ballot. The challenge was sufficient in number to affect the results of the election. Thereafter, the Petitioner filed timely objections to conduct affecting the results of the election.

In accordance with the National Labor Relations Board Rules and Regulations, the Regional Director conducted an investigation and, on January 18, 1968, issued and duly served upon the parties his Report and Recommendation on Objections and Challenge in which he recommended that the challenge to the ballot be sustained and that the objections be dismissed. Thereafter, the Employer filed timely exceptions to the Regional Director's Report on Objections and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the policies of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within

the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated, and we find, that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All truck drivers, warehousemen, and mechanics, including the warehouse clerk, leader, receiving clerk and extra drivers, but excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

5. The Board has considered the objections, the Regional Director's Report, the Employer's exceptions and brief, and hereby adopts the Regional Director's findings, conclusions, and recommendations.[1]

Accordingly, as the tally of the ballots shows that the Petitioner has received a majority of the valid votes cast, we shall certify it as the representative of the employees in the appropriate unit.

Certification of Representative

It Is Hereby Certified that Local 430, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America has been designated and selected by a majority of the employees of the Employer in the unit found appropriate herein as their representative for the purposes of collective bargaining and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all employees in such unit for purposes of collective bargaining with respect to rates of pay, wages,

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[1] The Employer's exceptions, in our opinion, raise no material or substantial issues of fact or law which would warrant reversal of the Regional Director's findings and recommendations. In the absence of exceptions to the Regional Director's recommendations. In the absence of exceptions to the Regional Director's recommendation as to the challenged ballot the Board adopts *pro forma* his recommendation.

hours of employment, and other terms and conditions of employment.

Dated, Washington, D. C. March 7, 1968.

JOHN H. FANNING,

Member

HOWARD JENKINS, JR.,

Member

SAM ZAGORIA,

Member

(Seal)

National Labor Relations Board.

APPENDIX F

Report and Recommendation on Objections and Challenge

Pursuant to a Stipulation for Certification Upon Consent Election executed October 25, 1967, an election by secret ballot was conducted on November 17, 1967, under my supervision and direction in a unit described in paragraph 12 of the Stipulation.

Copies of the Tally of Ballots were served on the parties immediately following the election. The Tally shows the results of the election as follows:

Approximate number of eligible voters	24
Void ballots	0
Votes cast for Petitioner	12
Votes cast against participating labor organization	11
Valid votes counted	23
Challenged ballots	1
Valid votes counted plus challenged ballots	24

The challenged ballot is sufficient in number to determine the results of the election.

On November 24, 1967, the Employer filed and served timely Objections, which allege:

1. A former employee, Daniel Sharp, who had been discharged for cause by the Employer on October 26, 1967, was allowed to come to the Employer's premises and cast a challenged ballot in the election held on the Employer's premises on November 17, 1967, over the protests of the Employer and its Counsel, even though no charges had been filed against the Employer alleging an unfair labor practice because of Sharp's discharge. The discharge of Sharp had become a paramount issue in the campaign, and his appearance on the premises and his voting a challenged ballot gave the apperance to the employees that the Company had wrongfully discharged Sharp and that the Petitioner was able to subvert the Employer's disciplinary rules and get Sharp reinstated with the approval of the National Labor Relations Board.

2. Several days prior to the election held on November 17, 1967, the Petitioner through its agents, representatives and adherents, coerced the employees of the Employer by threatening that if the employees of the Employer did not vote for the Petitioner, the Employer would lose the business of one of its largest distributors, whose employees were under contract to the Teamsters Union and would refuse to handle the Employer's products, thereby causing the Employer to be forced to lay off some employees.

3. Several days prior to the election held on November 17, 1967, the Petitioner through its agents, representatives, and adherents, promised employees of the Employer that if they voted for the Petitioner, the Petitioner would provide jobs for the employees on their days off with employers with whom the Petitioner had a contract.

4. By the above and other acts and conduct of Petitioner and its agents, representatives and adherents, the Employer's employees were coerced and restrained in the exercise of their rights guaranteed under the Act and were denied the opportunity to make a free, fair, and reasoned choice under the "laboratory conditions" specified by the Board for the conduct of its elections.

Pursuant to paragraph 6 of the Stipulation for Certification Upon Consent Election and Section 102.69(c) of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended and revised, an investigation of the Challenge and Objections was conducted under my direction and supervision. During the investigation, each party was afforded full opportunity to present witnesses, evidence, documents, statements and letters pertinent to the issues raised by the Challenge and Objections. On the basis of all the evidence and materials adduced in the investigation and relevant precedents, I report as follows:

The Challenged Ballot

The Employer challenged the ballot of Daniel Sharp because he had been discharged for cause on October 26, 1967. No unfair labor practice charge has been filed alleging that Sharp was discriminatorily discharged.

Since Sharp was not employed on the day of the election, and since he is not the subject of a charge, I find and conclude that he is an ineligible voter and recommend, therefore, that the challenge to the ballot of *Daniel Sharp* be sustained.

The Objections

Objection 1—Sharp's eligibility was reviewed at the preelection joint conference. The Employer contended he was ineligible because he was fired for cause, and the Union argued he was eligible. The Employer said nothing about prohibiting Sharp's entry into the plant to cast a challenged ballot.

Shortly after the voting began, Sharp appeared at the polls, cast a challenged ballot and left. There was no evidence offered by the Employer or disclosed in the investigation showing that Sharp engaged in any form of electioneering or made any appeals to the voters.

The Employer argues that because Sharp's discharge "had become a paramount issue in the campaign." Sharp's mere presence in the plant as a challenged voter created the impression for employees that Sharp was "wrongfully discharged" by the Employer and that the Union could "subvert the Employer's disciplinary rules and get Sharp reinstated with the approval of the National Labor Relations Board." The foregoing seems to imply that the employees' free choice was impaired by Sharp's casting a challenged ballot.

I am unpersuaded that Sharp's mere presence to cast a challenged ballot affected the employees in the manner ascribed by the Employer. To extrapolate from Sharp's casting a ballot that the employees' votes were affected is unsustained, unreasonable, and speculative. The Board considers whether the "specific act reasonably tends to interfere with a free choice of representatives and not with the subjective reaction of employees to the alleged interference." *Allied Plywood Corp.*, 122 NLRB 959. I am unable to find any basis for concluding that Sharp's mere casting of a challenged ballot affected the employees' free choice. How and in what manner eligibles interpreted Sharp's presence and whether his action influenced their vote are pure speculation. Clearly, the objective fact of his voting a challenged ballot does not support the conclusion that his action impaired the employees' free choice. *Delaware Mills, Inc.*, 123 NLRB 943. Indeed, the absence of a charge alleging Sharp's discriminatory discharge would tend to support the conclusion that he was not wrongfully fired. I fail to see how permitting him to enter the plant to cast a challenged ballot constitutes a factual or legal chain subverting the Employer's disciplinary rules or suggesting that Sharp was being reinstated with the NLRB's approval.

Apparently, Sharp's presence in the plant and at the polls to cast a challenged ballot did not interfere with the conduct or results of the election since the Employer's observer signed the "Certification on Conduct of Election" at the conclusion of the balloting.

On the basis of the undisputed facts, the analysis and applicable precedents, I find and conclude that Sharp's casting of a challenged ballot raises no substantial and material issues with respect to the election. Accordingly, I recommend that *Objection 1* be dismissed.

Objection 2 — The Employer submitted four employee statements (drivers and loaders) in support of this Objection. These witnesses were interviewed by an NLRB agent. Their testimony concerns incidents at the loading dock of Gourmet Snacks, Inc., Linden, New Jersey, where the Employer's products are delivered by its drivers.

In his initial statement, the first witness asserts that on November 10, 1967, while making a delivery to Gourmet, he overheard a driver for another company, whom he could not identify, speak to an El-Ge driver. Allegedly, the unidentified person spoke to the El-Ge driver about Gourmet's union men not unloading non-union trucks and said "they" had been talking about doing this for a long time. In his subsequent affidavit prepared during an interview with the Board Agent, this witness modified his initial statement. He testified that he merely presumed the conversation was about Gourmet's employees not unloading non-union trucks. The witness said he only heard the unidentified driver tell the El-Ge employees, "we've been talking about this a long time." He also testified that no one connected with Gourmet even mentioned not unloading non-union trucks.

The El-Ge driver referred to by this witness was interviewed. He, too, testifies that no Gourmet employee ever spoke with him about unloading non-union trucks.

A second witness said in the statement supplied by the Employer that he heard talk among fellow employees about Gourmet's people not unloading their vehicles because El-

Ge was not unionized. In the affidavit obtained by the Board Agent, this witness testified that, in May 1967,[1] some El-Ge employees were discussing the advisability of joining the Petitioner. One employee commented that since Gourmet was unionized, they (Gourmet's employees) would prefer El-Ge to be unionized. The witness said he understood this was what a driver for a third employer told an El-Ge employee. In any event, he identified no statement by anyone connected with Gourmet about not unloading El-Ge's vehicles.

A third witness, supplied by the Employer testified that, for the past several years, El-Ge's drivers have discussed the possibility that sometime in the future they might be unable to deliver at Gourmet Foods. He says that about a week before the election, employee Carl Frigm, whom he believed to be an organizer for the Petitioner, mentioned this possibility.

(Regarding Carl Frigm, the evidence shows that he has been employed by the Employer as a driver for about 11 years. Although an outspoken supporter of the Union, he is a rank-and-file employee without any special Union office identification, authority, or status.)

This same witness also testified that one of Gourmet's tow-operators told him on several occasions that "they" were trying to include a provision in their contract with Gourmet that all incoming materials would have to be union made. The witness identified the operator as a rank-and-file employee who had no formal union position.

The Employer's fourth employee witness said in his initial statement that about 60 days before the petition was filed he had a conversation with a truck driver (whose name and employer were unknown) making a delivery at Gourmet Foods. This driver, according to the witness, said that Gourmet's employees would not unload non-union goods. Thereafter, this witness discussed the driver's statement with fellow workers at El-Ge.

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[1] According to this witness, this conversation took place long before the Petitioner began its organizational compaign at El-Ge.

In his affidavit given to the Board Agent, the witness added the following incident: About July or August 1967,[2] while making a delivery at Gourmet, he heard an El-Ge employee ask a tow-motor operator for Gourmet if deliveries were being accepted only from unionized suppliers. The witness testified, "I believe the operator said, 'that's what we're trying to get, but we haven't got it yet'."

Another employee witness interviewed by the Board Agent testified that for a year or more, two rank-and-file drivers have talked about Gourmet employees not wanting to unload El-Ge's trucks. In addition, he testified that he always heard this talk from men unloading at Gourmet's dock when these two El-Ge drivers were present.

Several unmistakable points emerge from the above-reported evidence. *First*, the evidence shows that for several years the Employer's drivers had discussed with Gourmet's employees and others, as well as among themselves, the possibility that Gourmet's employees might choose not to unload non-union goods arriving from El-Ge. *Second*, the undisputed evidence shows that the Petitioner had nothing to do with these conversations; it neither sponsored, authorized, adopted, implemented or ratified them. These discussions involved only rank-and-file employees. *Third*, the evidence reveals that some of these conversations occurred before the petition herein was filed and hence would be excluded from consideration under well-settled NLRB decisions. And *finally*, the evidence does not indicate any threats of reprisal against eligibles or suggest that kind of general atmosphere of confusion or fear which rendered impossible a free election.

In the absence of any evidence showing Petitioner's responsibility, authority or ratification of rank-and-file statements, I find that since the post-petition comments are unattributable to the Petitioner, they provide no basis for concluding that the employees' free choice was impaired. *Poinsett Lumber & Manufacturing Co.*, 107 NLRB 234;

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[2] The petition herein was filed on September 28, 1967.

N. B. Leibman & Co., 112 NLRB 88; *O. K. Van Storage Co.*, 122 NLRB 795.

Even if I assume that rank-and-file comments about not unloading non-union (El-Ge's) products amounted to a threat of reprisal if workers voted against the Union, I would find this insufficient since the Petitioner was not responsible for, nor had knowledge of, such alleged threats. In both *Superior Wood Products, Inc.*, 145 NLRB 782 and *Hurwitz Electrical Company*, 146 NLRB 1265, the unions' threats of reprisal were made by admitted Union agents, unlike the facts in this case. Nor did the statements of rank-and-file employees create the kind of atmosphere rendering impossible an uncoerced election. Cf., *Diamond State Poultry Co.*, 107 NLRB 3.

I note also that the Employer was aware of these statements before and after the petition was filed but took no steps to advise eligibles that Gourmet's employees could not lawfully refuse to unload El-Ge's products, nor to assure them that the Employer would use every lawful means to insure continued deliveries whatever the results of the election. Indeed, the Employer could have asked Petitioner to refute and deny any such statements. It did nothing about them until the Objections were filed.

Careful and logical examination and analysis of all the evidence in light of applicable precedents persuade me that under all the circumstances, the Petitioner did not threaten employees with loss of employment if they voted for it. In reaching this conclusion. I have evaluated the evidence in a light most favorable to the Employer. (There is at the core no significant factual issues.) On the basis of the above, I find and conclude that *Objection 2* does not raise any material and substantial issues with respect to the election. Accordingly, I recommend it be dismissed.

Objection 3 — The Employer furnished two employees' statements in support of this Objection which asserts that the Petitioner promised employees jobs on their days off with other employers under contract with the Petitioner if eligibles voted for it.

In substance, both employee witnesses stated that other drivers told them they wanted union cards to get temporary or permanent work with unionized employers. No evidence was presented by these witnesses nor adduced in the investigation showing that Petitioner promised union cards to eligibles in exchange for voting for the Petitioner.

The substantially undisputed facts reveal that several employees said that if the Employer were unionized, they would be able to obtain jobs with other employers. The employees expressed a hope, and they talked about it with other employees. This speculation and expectation did not arise from any action or conduct of the Petitioner. There isn't a scintilla of evidence showing that the Petitioner made any promises or that it was even aware of these conversations among employees. Where, as here, affected workers discuss among themselves prospective advantages to unionization, these verbalisms fall short of establishing any promise of benefits by Petitioner.

In the absence of any evidence showing that the Petitioner promised jobs to eligibles if they voted for it, I find and conclude that *Objection 3* raises no material and substantial issues with respect to the election. Accordingly, I recommend it be dismissed.

Objection 4 — This is a conclusionary and summary Objection. Specifically the Employer asserts that: (A) The Petitioner threatened an employee with discharge; and (b) Petitioner's cumulative conduct warrants setting aside the election.

With respect to (a), the investigation reveals that during Petitioner's organizational campaign but before the petition was filed, several rank-and-file employees told a fellow employee they would bet he'd be the first one discharged if the Union did not get in. The employee said he didn't believe it. Later, the Employer, who learned about this conversation, assured the employee that he would not be fired.

Inasmuch as the alleged rank-and-file threats were uttered prior to the filing of the petition, the evidence may

not be considered in support of the Objections under settled NLRB decisions. *The Ideal Electric & Manufacturing Co.*, 134 NLRB 1275; *Goodyear Tire & Rubber Co.*, 138 NLRB 453. Even if the conversation occurred after the petition was filed, there is no evidence showing any involvement by the Petitioner. And finally, the alleged statement seems illogical. If the Petitioner lost the election it would be in no position to cause the workers' discharge, prevent it, or be accountable for it. In light of the foregoing, I find no basis for sustaining (a) above.

With respect to the cumulative contention, I find that neither singly nor cumulatively does the evidence support the Objections. Accordingly, I find and conclude that *Objection* 4 raises no material and substantial issues with respect to the election, and I recommend it be dismissed.

Findings, Conclusions and Recommendations

Upon the basis of the facts and in accordance with applicable Board precedents, I find, conclude, and recommend that the challenge to the ballot of *Daniel Sharp* be sustained and his ballot not counted.

Further, I find, conclude, and recommend that the Objections do not raise any substantial and material issues with respect to the election and should be dismissed.

Dated at Philadelphia, Pennsylvania, this 18th day of January 1968.

/s/ BERNARD SAMOFF,
Regional Director for the
Fourth Region,

National Labor Relations Board,
1700 Bankers Securities Building
Philadelphia, Pennsylvania.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 933

EL-GE POTATO CHIP COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-7a) is reported at 427 F. 2d 903. The decision and order of the National Labor Relations Board (Pet. 7a-19a) are reported at 173 NLRB No. 19; its decision in the related representation proceeding is set forth at Pet. App. 20a-22a.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on August 7, 1970. The petition for a writ of certiorari was filed on November 4,

1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly overruled the employer's objections to a representation election without holding an evidentiary hearing, where the objections presented no material issues of fact.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

On November 17, 1967, the Board's Regional Director conducted a representation election among the Company's truck drivers, warehousemen, and mechanics (Pet. App. 20a-21a). There were 12 ballots cast for the Union (Local 430 of the Teamsters), 11 against it, and 1 challenged ballot (Pet. App. 20a).

The Company filed timely objections to the election, contending that conduct by the Union had improperly influenced its outcome (Pet. App. 23a-24a). Pursuant to the Board's Rules (29 C.F.R. 102.69(c)), the Regional Director conducted an administrative investigation, giving the parties full opportunity to submit pertinent evidence. His report recommended that the Board sustain the challenge to the ballot of Daniel Sharp (Pet. App. 24a)[1] but overrule the objections (Pet. App. 22a-31a). The Company's objections to the election and the Director's evaluation of them may be summarized as follows:

1. The Company contended that the discharge of Sharp had become a "paramount" issue in the campaign, and thus his appearance on the premises and his voting a challenged ballot gave the appearance to the employees that the discharge had been unlawful and the Union had secured Sharp's reinstatement with the Board's "approval" (Pet. 23a). The Regional Director concluded that Sharp's presence on the employer's premises for the purpose of casting a challenged ballot did not impair the employees' free choice in the election;[2] no evidence was offered by

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[1] The Company challenged the ballot of Sharp on the ground that he had been discharged for cause on October 26, 1967. Since Sharp was not employed on the day of the election and no unfair labor practice charge had been filed respecting his discharge, the Regional Director concluded that he was ineligible to vote.

[2] Sharp's eligibility had been an issue at the pre-election joint conference, where the Company and the Union had taken conflicting positions regarding his eligibility. The Company

the Company or disclosed in the investigation which showed that Sharp, while on the Company's premises, had engaged in any electioneering or made any direct appeals to voters (Pet. App. 25a). The Director also noted that, at the time of the election, the Company did not consider Sharp's presence in the plant and at the polls to constitute election interference, for its observer signed the "Certification on Conduct of Election" at the conclusion of the balloting without qualification (Pet. App. 26a). Finally, the Director ruled that the post-election view of some employees as to the impact of Sharp's presence on their vote [3] was "pure

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said nothing then about prohibiting Sharp's entry into the plant to cast a challenged ballot. (Pet. App. 24a.)

In allowing Sharp to file a challenged ballot, the Board agent followed prescribed procedure. The Board's Rules (29 C.F.R. 102.69(a)) provide that "any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election." Where a prospective voter is challenged, the Board agent does not himself make an eligibility ruling. The Rules further state that the "ballots of such challenged persons shall be impounded" and that, if it is later determined that such ballots may affect the outcome of the election, the "regional director shall investigate such * * * challenges * * * [and issue] a report on challenged ballots * * *" (29 C.F.R. 102.69(c)).

[3] President Gillespie, in an affidavit submitted to the Regional Director, stated that employee Myers "informed me after the election that he was surprised to see Daniel Sharp coming in to vote," and that "he felt that Sharp's presence during the voting influenced many of the truck loaders to vote for the Union" (A. 74-75). Gillespie also stated that, prior to the election, one employee informed plant production manager Robertson "that he would vote *against* the Union if Mr. Robertson would rehire Daniel Sharp" (A. 74, emphasis added). ("A." refers to the Appendix to the briefs in the court of appeals.)

speculation" and of no probative value since it merely reflected " 'the subjective reaction of employees to the alleged interference,' " *Allied Plywood Corp.*, 122 NLRB 959, 961 (Pet. App. 25a).

2. The Company alleged that the Union threatened employees that, if they did not vote for the Union, the Company would lose the business of one of its largest distributors, Gourmet (Pet. App. 23a). The Director, after considering four employees' statements submitted by the Company as well as the affidavits of those employees taken by a Board agent (Pet. App. 26a) and evaluating "the evidence in a light most favorable to the Employer" (Pet. App. 29a), concluded that there was no merit to this objection. The evidence showed that for several years the Company's drivers had discussed with Gourmet's employees and others the possibility that employees of Gourmet might not continue to unload non-union goods arriving from the Company; however, it was undisputed that the Union took no part in these conversations and that many of them took place before the election petition was filed (Pet. App. 28a).[4] Moreover, the Director found, there was no evidence of "threats of reprisal against eligibles [voters]" (*ibid.*). Finally, he noted that the Company, though aware that the statements were made, took no action to advise its employees that Gourmet's employees could not

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[4] Under established Board policy, conduct which takes place before an election petition is filed is not considered a basis for setting aside the election. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275, 1278; *National Labor Relations Board* v. *Golden Age Beverage Co.*, 415 F. 2d 26, 31 (C.A. 5).

lawfully refuse to unload its products (Pet. App. 29a).

3. The Company contended that the Union promised employees that, if they voted for the Union, they could get jobs on their days off with other employers under contract with the Union (Pet. App. 23a). The Director considered two employees' statements furnished by the Company, and found, on "substantially undisputed facts," that some employees told other employees that, if the Company were organized, they would be able to obtain jobs with other employers. The Director further found, however, that these statements could not be attributed to the Union or its agents, and in any event that they constituted legitimate discussion by employees of the possible advantages of unionization. The Director accordingly overruled this objection. (Pet. App. 30a.)

4. The Company contended that the Union had threatened an employee with discharge (Pet. App. 30a). The Director found that during the organizational campaign, but before the election petition was filed, several rank-and-file employees told a fellow employee they would bet he would be the first to be discharged if the Union did not get in; the Company, on learning of the incident, assured the employee he would not be fired. The Director concluded that the objection did not afford a basis for setting aside the election, for there was no evidence that the Union was responsible for these statements; the conduct antedated the filing of the election petition (see n. 4, *supra*); and the remarks could not have been viewed as a threat of Union retaliation, because, if the Union

lost the election, it would obviously have been "in no position to cause the workers' discharge, prevent it, or be accountable for it" (Pet. App. 30a-31a).[5]

The Company filed exceptions to the Director's decision, requesting the Board to set aside the election or, in the alternative, to direct a hearing to resolve the factual issues raised by its objections (Pet. App. 10a). The Board, finding that the Company's exceptions raised "no material or substantial issues of fact or law" warranting either reversal of the Regional Director's findings or the direction of a hearing (Pet. App. 21a, n. 1), certified the Union (Pet. App. 21a-22a).

The Company refused to bargain, and an unfair labor practice complaint issued based on charges filed by the Union (Pet. App. 10a). The Trial Examiner granted the General Counsel's motion for judgment on the pleadings, finding that all the issues had already been decided in the representation proceeding (Pet. App. 11a). The Board adopted the Trial Examiner's decision holding that the Company had violated Section 8(a)(5) and (1) of the Act, and ordered it to bargain with the Union upon request (Pet. App. 7a-8a, 17a-19a).

The court of appeals, one judge dissenting, upheld the Board's findings and conclusions, and enforced its order (Pet. App. 2a-7a).

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[5] Finally, the Director considered and rejected the Company's contention that the cumulative effect of all the events described above was to deprive the employees of their freedom of choice in the election (Pet. App. 31a).

ARGUMENT

The petition is premised on the contention that the Company's objections to the election presented material issues of fact which the Board should not have decided without an evidentiary hearing. As shown above, however, the Board accepted the Company's factual allegations as true, but found that they were not legally sufficient to justify setting aside the election.* Thus, the only question actually presented is whether the Board was reasonable in concluding that the conduct alleged by the Company did not affect the election results. Such an issue, which turns on the particular facts, does not warrant further review. In any event, as the court below correctly held (Pet. App. 6a), the Board's conclusions were reasonable.

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*The only disputed evidence was that concerning the employees' post-election subjective feelings concerning Sharp's presence (n. 3, *supra*), which the Board reasonably concluded lacked probative value. Cf. *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 608.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1970.

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